82-2107

NO._____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

STATE OF ALABAMA,

Petitioner

V.

HENRY TAYLOR,

Respondent

PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

OF

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR PETITIONER

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QUESTION PRESENTED

Where a party, who is not under arrest or otherwise restrained because of a certain charge, is indicted for said charge but for a substantial period of time after indictment the indictee cannot be located and arrested pursuant to the indictment and during said period of time the indictee is utterly unrestrained as regards the indictment and charge, should the delay of trial resulting from unsuccessful efforts to locate the indictee during such period be judged by due process standards or speedy trial standards?

THE PARTIES

In the Circuit Court of Jefferson County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court

of Alabama, the parties were: The State of Alabama, who is the Petitioner herein and Henry Taylor, who is Respondent herein.

The matters at issue here were first raised in the Circuit Court of Jefferson County, Alabama and have been at issue throughout these proceedings.

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The opinion of the Court of Criminal Appeals of Alabama reversing and rendering Respondent Taylor's conviction is not as yet reported but will be reported as follows:

Taylor v. State, ____ So. 2d ____ (Cr. App. Ala., 1983)

A copy of the same is submitted in Appendix "A" to this petition.

The order of the Supreme Court of Alabama denying the writ of certiorari in this case are not as yet reported but will be reported as follows:

Ex parte: State; In re: Taylor v. State, ____ So. 2d ____ (S. Ct. Ala., 1983)

A copy of the same is submitted in Appendix "B" to this petition.

JURISDICTION

The order of the Supreme Court of Alabama denying the writ of certiorari in this case was issued on April 29, 1983, and this petition is filed within sixty days of that date.

The Jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Court of Criminal Appeals of Alabama found that Respondent Taylor was denied his right to a speedy trial under the Sixth Amendment to the Constitution of the United States, which reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been

committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." (Emphasis supplied)

The Petitioner State insists that Respondent Taylor's claim should have been decided under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

"...All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws..." (Emphasis supplied.)

STATUTORY PROVISIONS INVOLVED

Respondent Taylor was convicted of common law robbery and sentenced under Title 13, Section 13-3-110, Code of Alabama, 1975. See Appendix "C".

STATEMENT OF THE CASE AND THE FACTS

The Court of Criminal Appeals of Alabama accurately stated the case and the facts which led to Respondent Taylor's speedy trial claim, as follows:

> "The defendant was indicted and convicted for robbery. Alabama Code Section 13-3-110 (1975). Sentence was ten years' imprisonment. The only issue argued on appeal is the denial of the defendant's Sixth Amendment right to a speedy trial.
>
> "The facts governing this issue are set forth in chronological order.

"May 24, 1976 Robbery committed.

"May 26, 1976 The defendant was arrested. He was on parole for a previous unrelated offense.

"July 26, 1976 Sometime after this, the defendant's parole was revoked because of the robbery charge and the defendant was returned to Kilby State Penitentiary. The District Attorney had a hold placed against the defendant.

The grand jury 'no billed' the charges against the defendant. This was an error or mistake resulting from confusion over the names of the three men involved in the robbery and the role each played.

Sometime after this action by the grand jury, the hold against the defendant was withdrawn.

"September 10, 1976 The defendant was indicted.

"September 28, 1976 — An arrest warrant for the defendant was returned not executed for the following reasons checked on the warrant: 'moved, no forwarding address'; incorrect address'; 'not employed at listed location'.

At this time the defendant was still in the state penitentiary.

"July 27, 1977 — The defendant was released from prison after completing his sentence. No limitations requirements or restrictions were placed upon his activities upon release. There were no 'holds' or detainers against the defendant.

Upon release, the defendant moved to Montgomery[1] where he openly resided and worked until his arrest.

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[1]The instant case arose in Fultondale, Jefferson County, Alabama; the City of Montgomery is located in Montgomery (con't)

"January 3, 1978	A second arrest warrant was issued for the defendant and returned marked 'does not reside at address; not known at this address'. This address was the same as that of the warrant of September 26, 1976.
"December 27, 1978	The defendant's 'court file' was rebuilt after the original had been 'lost or misplaced'. The State Board of Administrations (the predecessor of the State Board of Corrections) was ordered to have the defendant present.
"January 3, 1979	An 'alias capias order' was issued after the original had been lost.
"January 18, 1979	The case was set for arraignment and the Board of Corrections was ordered to have defendant present.

(footnote 1 con't)

County, Alabama. A distance of about one hundred miles separates Jefferson and Montgomery counties.

"January ?, 1981	After the defendant was involved in a traffic accident in Montgomery, he was arrested for the 1976 robbery.
"February 13, 1981	Counsel was appointed to represent the defendant and the defendant was arraigned. Trial was set for May 26, 1981.
"May 26, 1981	The defendant filed a motion to dismiss the indictment on the basis of the denial of a speedy trial. The motion was heard, evidence presented and denied.
	"The defendant was tried upon a stipulation of facts and adjudged guilty.
	"(The judgment entry recites that all of this occurred on May 25, 1981.)

(Taylor v. State, ___ So. 2d ___ [Cr. App. Ala., 1983]; Appendix "A", pages 1-6)

To this need only be added: (1) After the detainer was withdrawn in 1976, no other detainers or warrants were lodged against Respondent Taylor with the prison authorities. He testified that he knew nothing of the instant charge until he was arrested on the indictment in January of 1981, about five (5) months before trial.[2]

2. Although the Court of Criminal Appeals may have put very little emphasis on it, the Court's statement as to Respondent Taylor's claim of loss of memory about the date of robbery is not exactly accurate. Actually, Respondent Taylor denied any knowledge at all of the

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[2]"...I didn't know anything about it [i.e the indictment] until I had a car wreck Christmas Eve night...." (R. 16)

robbery and even denied his May 26, 1976, arrest by the Fultondale police.[3]

3. Following the denial of his motion to dismiss, Respondent Taylor stipulated to the facts of the robbery in which he was the gunman. (R. 133-137)

On appeal the Court of Criminal Appeals of Alabama reversed and rendered Respondent Taylor's conviction on the grounds that he had been denied a speedy trial. The Court found that the delay in locating Taylor was long enough to trigger speedy trial inquiry. Although the Court found not even a suggestion of intentional delay on the part of the State, it did find that the State was negligent in not looking for Taylor in

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[3]"...Q. Weren't you arrested on this charge by in Jefferson County on May 24, 1976?

"A. No." (R. 16)

the penitentiary during the first ten months of this time. The Court found that Respondent Taylor's assertion of his right on the day of trial, some five months after his arrest was not tardy. Finally, the Court, finding no evidence of prejudice, presumed prejudice from the length of the delay. On February 1, 1983, the Court of Criminal Appeals reversed and rendered Respondent Taylor's conviction. (Appendix "A")

The State applied for rehearing, but the application was overruled on March 1, 1983.

The State petitioned the Supreme Court of Alabama for review by writ of certiorari raising the issued raised here. The State's petition was denied on April 29, 1983. (Appendix "B")

SUMMARY OF THE ARGUMENT

At issue in this case is the question of what standards apply in measuring the delay of trial occasioned by unsuccessful efforts to locate indictees.

This Honorable Court has never had occasion to address the issue of post-indictment, pre-arrest delay. United States v. Marion, (404 U.S. 307, 30 L. Ed. 2d 468, 92 S. Ct. 455 [1971]), United States v. Lavasco, (431 U.S. 783, 52 L. Ed. 2d 752, 97 S. Ct. 2044 [1977]) and United States v. MacDonald, (456 U.S. 1, 71 L. Ed. 2d 696, 102 S. Ct. 1497 [1982]), the cases which are usually cited as controlling post-indictment delay each involved an arrest on the indictment within two weeks after the indictment's return.

This Honorable Court ought to address this issue for the following reasons: (1) Practical considerations, including the conflict between an accused person's right to be personally present at his criminal presecution and the limitations placed on the government interference with the liberty of movement of citizens; the practical difficulties in locating indictees, the seriousness of many cases which involve unlocatable indictees, and the high premium which is placed on evading criminal prosecutions when speedy trial standards are applied to post-indictment, pre-arrest delay, (2) Manifest confusion in the lower state and federal courts which result from efforts to apply speedy trial standards to an entirely inappropriate situation, and (3) the fact that the speedy trial policy and

standards bear no relation to the post-indictment, pre-arrest situation.

The policy of applying speedy trial standards to post-indictment, pre-arrest delay places form over substance, encourages the prosecution to delay presenting cases to grand juries and thereby contributes to trial delay while depriving unlocatable accused persons of the protection of grand jury proceedings.

ARGUMENT

Although Respondent Taylor was arrested in 1976, the case was "no billed" by the Grand Jury about two months later, and at that time the detainer which had been placed against him was removed. There is no suggestion of any speedy trial rights with regard to this period. See United States v. MacDonald, 456 U.S. 1, 71 L. Ed. 2d 696, 102 S. Ct. 1497 (1982)

From that time until his final arrest in January of 1981, the charges represented by the indictment had no legal or practical effect on Respondent Taylor.

At issue in this case is the period after indictment, during which Respondent Taylor's status as to the instant charges remained unchanged. Indeed, Respondent Taylor claimed that he knew nothing about the instant charges until his arrest some five months before trial. The Court of Criminal Appeals found that the State was negligent in its efforts to locate Taylor. However, the Court could not find any indication of intentional delay. The record will not support a suggestion that the prosecution was ever dropped or abandoned. If the officers charged with locating Respondent Taylor did not look for him in prison during the first ten

months, there is no indication that they had any reason for thinking he was in prison. If they didn't seek Respondent Taylor in Montgomery where he was allegedly living openly, there was no reason why they should seek him there either.

On the other hand, there is in this case no suggestion of actual prejudice to Respondent Taylor's defense. The Alabama Courts found prejudice presumed from the length of the delay. However, as will be discussed more thoroughly below, the presumption of prejudice is based on concerns which are irrelevant to Respondent Taylor.[4]

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[4]See page 40-41, below.

In this case, the Court of Criminal Appeals blindly followed the speedy trial rules laid down by this Honorable Court in cases with facts radically different from those of the instant case. In fact, this Honorable Court has never addressed this particular issue at all; as more particularly appears below:

REASON FOR GRANTING THE WRIT:

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN BUT OUGHT TO SETTLE BY THIS HONORABLE COURT.

I.

THIS HONORABLE COURT HAS NEVER ADDRESSED THIS QUESTION.

This Honorable Court has on several occasions addressed the question of pre-trial delay and has recognized and addressed three general types of pre-trial delay:

(1) where a person is arrested and later indicted [5] and still later brought to trial, this Court has held that the right to a speedy trial attaches at arrest and that the delay from the time of the crime until arrest is measured by general due process considerations. Dillingham v. United States, 423 U.S. 64, 46 L. Ed. 2d 205, 96 S. Ct. 303 (1972)

(2) Where a person is not arrested until after indictment, this court has held that the right to a speedy trial attaches at indictment and the pre-indictment delay is measured by due process standards. United States v. Marion, 404 U.S. 307, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971); United States v. Lavasco, 431 U.S. 783, 52 L. Ed. 2d 752, 97 S. Ct. 2044 (1977)

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[5] In this argument "indicted" will be used as a short expression for "indicted or otherwise formally charged."

(3) Where a person is arrested or indicted and the charges are dismissed without trial but the person is later re-arrested or re-indicted, the right to a speedy trial attaches at the second arrest or indictment and the due process standards control the prior delay. United States v. MacDonald, 456 U.S. 1, 71 L. Ed. 2d 696, 102 S. Ct. 1497 (1982)

There is, however, a fourth common situation, which is presented by the instant case and which this Honorable Court has never had the opportunity to address. This is the situation where a party is indicted but cannot be located and for this reason is not arrested or otherwise restrained under the indictment for a substantial period of time thereafter. At first glance, it might appear that Marion, Lavasco and

MacDonald, above, control this situation and indeed most courts have so assumed, but a close examination of these cases reveals that this issue was not before the Court in those cases.

In Marion the defendants were indicted on April 21, 1970, and filed their motion to dismiss on May 5, 1970.[6] They, therefore, had to have been arrested under the indictment within the ensuing twelve (12) days. The indictment in Lavasco was returned March 6, 1975,[7] and the defendant moved to dismiss it on March 18, 1975.[8] Thus,

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[6]United States v. Marion, 404 U.S. 307, 308-309, 30 L. Ed. 2d 468, 472, 92 S. Ct. 455 (1971)

[7]United States v. Lavasco, 431 U.S. 783, 784, 52 L. Ed. 2d 752, 755, 97 S. Ct. 2044 (1977)

[8]Lavasco v. United States, Judge Henley's dissent, 532 F. 2d 59, 63 (8th Cir., 1976)

Lavasco too must have been arrested within twelve (12) days of the indictment. MacDonald was indicted on January 24, 1975, and "...He was promptly arrested and then released on bail a week later...." United States v. MacDonald, 435 U.S. 850, 852, 56 L. Ed. 2d 18, 22, 98 S. ct. 1547 (1978) Thus, the delay in locating and arresting the indictees in Marion, Lavasco and MacDonald did not exceed two weeks. The issue before the Court in Marion, Lavasco and MacDonald was the substantial time period between the crime and the indictment, not the inconsequential periods between indictment and arrest.

This case presents this Court's first opportunity to address the issue of substantial post-indictment, pre-arrest delay.

II.

THIS HONORABLE COURT SHOULD ADDRESS THIS QUESTION.

The reasons this Court should address this issue fall into three catagories: (1) The unique practical considerations in this area, (2) the confusion in the State and lower federal courts which results from (3) the application of the speedy trial standards of Barker v. Wingo, (407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 [1972]) to situations which are entirely different from that which gave rise to the Barker standards.

A.

PRACTICAL CONSIDERATIONS

The common situation of the unlocatable indictee presents unique

problems present in neither the investigatory phase prior to indictment nor the trial phase after the accused has been arrested.

First, there is the conflict a constitutional mandate and constitutional limitations, between a right of the indictee as an accused person and the general rights of citizens to privacy and freedom of movement. On the one hand, an accused has the fundamental right to be personally present at his trial. Hopt v. Utah, 110 U.S. 574, 28 L. Ed. 262, 4 S. Ct. 202 (1884); Lewis v. United States, 146 U.S. 370, 36 L. Ed. 1011, 13 S. Ct. 136 (1892) In extraordinary circumstances an accused can be held to have waived such right. (Illinois v. Allen, 397 U.S. 337, 25 L.Ed. 2d 353, 90 S.Ct. 1057 [1973]), but the fact that the

police cannot locate an indictee would hardly justify dispensing with his personal presence at trial. On the other hand, freedom of movement is one of our basic liberties.[9] In addition, constitutional limitations are placed on government in this country in order to guarantee every citizen's right to move about, change his address, job or life style without embarassment or governmental interference. An unarrested indictee has these same protections, but governmental interference is exactly what is required if an indictee is to be

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[9]"...Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values..." Kent v. Dulles, 357 U.S. 116, 126, 2 L.Ed. 2d 1204, 1210, 78 S.Ct. 1113 (1958)

arrested and brought before a court to answer charges. Thus, on the one hand, our Constitution requires the government to interfere with the indictee but, on the other hand, severely limits the government's power to interfere with citizens, including unarrested indictees.

In locating indictees the police are normally dealing with people who avoid police contact as a matter of course, especially when they have some reason to think that the police are interested in them. In seeking information and other assistance in locating an indictee, the police usually have to rely on friends and relatives of the indictee, persons more interested in assisting the indictee than the police. See, for example, People v. Yeager, 84 Ill. App. 3rd 415, 40 Ill. Dec. 549, 406 N.E. 2d 555, 558 (1980). In addition, prolonged delays in

arresting indictees usually result, as in the instant case, from the indictee's leaving the city or state where the charges are pending. In such cases reliance must be placed on the police agencies of other cities and states. While the cooperation among police agencies in this country is excellent, human nature being what it is, local cases take precedence over the needs of other jurisdictions. See, for example, State v. Larson, 623 P.2d 954, 656-657 (S.Ct. Mont., 1981).

In judging police efforts in locating indictees, the lower courts tend to use hindsight. The lower courts, for example, are quick to point out that the police could have located an indictee by examining the welfare rolls, (State v. Jones, 46 Or. App. 479, 611 P. 2d 1200 [1980]), or the veterans' affairs' agency, voter rolls or bank records in

another state, (People v. Yaeger, 84 Ill. App. 3rd 415, 40 Ill. Dec. 549, 406 N.E. 2d 555, 557 [1980]), or by identifying the indictee's child on school rolls or the indictee's common law wife in a particular newspaper's birth announcements. (Vickery v. State, 408 So. 2d 182, 183 [Cr. App. Ala. 1981].[10] The courts can make such judgments, because with hindsight they know where the indictee was and what he was doing during the period when the police could not locate him. But, the police at such time had no way of knowing which records, newspapers or places to search for information. In addition, many of these records are not available except by court order.

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[10]Cited and relied on by the Court of Criminal Appeals in this case.

Yet, the cases which involve delay resulting from failure to locate an indictee include some of the most serious cases which come before our courts. Persons who are able to avoid arrest for a prolonged period of time are often people with considerable skill or money or the backing of an organization. These include the professional criminals, racketeers and terrorists who present the gravest threats to our society and constitutional system.

A final practical problem concerns the placing of a high premium on the evasion of the law. Most, though not all, courts hold that an accused may not take advantage of delay which resulted from his actively avoiding arrest. However, it is usually impossible to say with any certainty whether the actions by the indictee which made him unlocatable

were intended to produce that result or merely did so coincidently. Thus, applying speedy trial standards to post-indictment, pre-arrest delay in effect gives the indictee who is skillful enough to avoid detection without appearing to do so, the power to create a perfect defense for himself, without regard to the facts of the case.

B.

CONFUSION IN THE STATE AND LOWER FEDERAL COURTS

In examining the question of post-indictment pre-arrest delay the lower courts universally apply the four part balancing test of Barker v. Wingo, (407 U.S. 514, 33 L.Ed. 2d 101, 92 So.Ct. 2182 [1972]), making few, if any, adjustments

for the peculiar problems of post-indictment, pre-arrest situation. As will be discussed in the next section, Barker was based on entirely different facts and most of its standards are difficult or impossible to apply in this situation.[11] The efforts of state and lower federal courts to fit the "square Barker peg" into the "round hole" of post-indictment, pre-arrest delay has resulted in such a jumble of authority that the constitutional effect of such delay depends entirely on the jurisdiction. For example:

The "triggering device," of Barker (407 U.S. 514, 530, 33 L.Ed. 2d 101, 92 S. Ct. 117 [1972]) length of the delay, has been found to have been set off by delays in locating the indictee of only a

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[11]See pages 41-42, below.

few months. E.G., six and a half months, State v. Jones (46 Or. App. 479, 611 P. 2d 1200, 1202, [1980]); nine months, State v. Holtslander, 102 Idaho 306, 629 P. 2d 702, 705 [1981]) and ten and one half months, State v. Ivory, (278 Or. 499, 564 P. 2d 1039 [1977]).

In judging the reason for the delay the courts tend to treat the failure to locate the indictee as being of about the same gravity as the failure to locate an important but not indispensible witness. As stated above, most courts refuse to allow an accused to profit by intentional efforts to evade arrest. State v. Lockman, 169 Conn. 116, 362 A 2d 920 (1975); cert. den. 423 U.S. 991, 46 L.Ed. 2d 309, 96 S.Ct. 403. However, at least one court found a denial of speedy trial on the basis of delay which resulted solely from the indictee's flight from

the state to avoid arrest and subsequent resistance to extradition. Prince v. Alabama, 507 F.2d 693 (5th Cir. 1975);[12] cert. den. 423 U.S. 876, 46 L.Ed. 2d 108, 96 S.Ct. 147; compare Prince v. State, 50 Ala. App. 368, 279 So. 2d 539 (1973). However, the courts generally refuse to hold actions by indictees which make them difficult to locate, against the indictees unless it can be proven that such actions were taken to avoid arrest, which is usually impossible to show. See People v. Yeager, 84 Ill. App. 3rd 415, 40 Ill. Dec. 549, 406 N.E. 2d 555 (1980) In judging the efforts of the police to locate the indictee, some Courts, as noted above (see pages 26-28), find negligence in the failure of the police

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[12]This case was cited and relied on by the State courts in the instant case.

to follow any "available avenue of investigation" in locating the indictee. State v. Ivory, 278 Or. 499, 564 P 2d 1039, 1041 (1977) Other courts, hold the police only to "reasonable efforts." State v. Holtslander, 102 Idaho 306, 629 P. 2d 702, 707 (1981)

One of the Barker standards is the accused person's assertion of his right. Obviously, if an unarrested indictee appeared and asserted his right, the whole problem would be mooted. The Courts generally dispense with this part of the Barker rule, as did the Alabama Courts in this case.

In judging prejudice, most courts reject claims by defendants that they cannot recall the events of the date of the crime. People v. Yeager, above, 406 N.E. 2d 555, 559. Other Courts, like

Alabama's, hold that such claims demonstrate prejudice. State v. Larson, 623 P. 2d 954, 959 (S. Ct. Mont. 1981). Many Courts presume prejudice from the length of the delay (People v. Yeager, above), others require only a "...reasonable possibility of prejudice...." (State v. Ivory, above, 565 P. 2d 1039, 1044 [1977]). Still other courts hold that in the post-indictment, pre-arrest situation, the defendant must show actual prejudice to his defense (State v. Holtslander, above, 629 P.2d 702, 708 ff) that was caused by the delay. (State v. Jones, 46 Or. App. 479, 611 P. 2d 1200, 1202 [1980])

The confusion evidenced by this brief digest of the problem arises, as noted, from trying to apply the doctrine of Barker v. Wingo, (407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 [1972]) to a

situation not contemplated by this Honorable Court in that case.

C.

SPEEDY TRIAL IS BASED ON CONCERNS AND IS JUDGED BY STANDARDS WHICH ARE IRRELEVANT TO POST-INDICTMENT, PRE-ARREST DELAY

As pointed out above, this Honorable Court has never addressed or even been asked to address the issue of post-indictment, pre-arrest delay. Lacking guidance, the lower federal and especially the state courts have produced the chaos of holdings noted above by applying speedy trial standards developed in cases where the accused was present or at least available and ready for trial to situations where the accused cannot be located.

The very expression "speedy trial" implies that a trial is possible. Before there can be a trial the accused must submit to the jurisdiction of the Court or be brought into submission by arrest. The availability of the accused for trial was an explicit or implicit factor in every speedy trial decision ever issued by this Honorable Court. See, for example, Klopfer v. North Carolina, 386 U.S. 213, 18 L. Ed. 2d 1, 87 S. Ct. 988 (1967) (Defendant in Court); Smith v. Hooey, 393 U.S. 374, 381, 21 L. Ed. 2d 607, 613, 89 S. Ct. 575 (1969) (Defendant was available for trial on writ of habeas corpus ad prosequendum); Dickey v. Florida, 398 U.S. 30, 26 L. Ed. 2d 26, 90 S. Ct. 1564 (1970) (same as in Smith Hooey, above); Barker v. Wingo, 407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972) (Accused in Court); Dillingham

v. United States, 423 U.S. 64, 46 L. Ed. 2d 205, 96 S. Ct. 303 (1975) (Accused arrested prior to indictment). However, until a trial becomes possible, it cannot be speedily held. A trial is simply not possible until the accused is located.

The rational basis for the right to a speedy trial has been stated many times by this Honorable Court. In Barker v. Wingo (above) this Honorable Court identified the interests which the right to a speedy trial is designed to protect:

> "...This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired...." (407 U.S. 514, 533, 33 L. Ed. 2d 101, 118)

The problem of the impairment of the defense transcends speedy trial and is,

in fact, a due process consideration. See United States v. Marion, 404 U.S. 307, 324 ff, 30 L. Ed. 2d 468, 480 ff, 92 S. Ct. 455 (1971) and United States v. Lavasco, 431 U. S. 783, 789, 52 L. Ed. 2d 752, 758, 97 S. Ct. 2044 (1977). The point was put in context just six months before Barker, above, in Marion, above, when this court wrote:

> "...Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy,

> and create anxiety in him, his family and his friends...." (404 U.S. 307, 320, 30 L. Ed. 2d 468, 478; emphasis supplied)

Similarly, just last year this Honorable court wrote in United States v. MacDonald, (456 U.S. 1, 71 L. Ed. 2d 696, 102 S. Ct. 1497 [1982]):

> "...The Sixth Amendment right to a speedy trial is thus not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges...." (456 U.S. 1, 8, 71 L. Ed. 2d 696, 704; emphasis supplied)

See also Moore v. Arizona, 414 U.S. 25, 27, 38 L. Ed. 2d 183, 186, 94 S. Ct. 188 (1973).

Thus, speedy trial concerns primarily the direct necessary effects of a pending criminal charge which the accused is being held to answer - pre-trial loss of freedom, the disruptive effect on the accused person's life and anxiety over the charge. This is the rational basis of the rule which presumes prejudice from a prolonged pre-trial delay after the right to a speedy trial has attached: The accused person's defense may not have been damaged, indeed he may never have had a defense, but he has been incarcerated or at least restrained in his movements, his life has been disrupted and he has suffered anxiety. However, none of this applies to post-indictment, pre-arrest delay. An indictee who cannot be located is not restrained in any way; he is exercising his freedom to the fullest. His life is unaffected by the unserved

warrant. If the indictee knows nothing about the indictment, he cannot be anxious about it; if he knows about it and doesn't surrender to answer it, his anxiety is self-imposed. Thus, the primary purposes of the right to a speedy trial are simply irrelevant to the post-indictment, pre-arrest situation.

The leading case on speedy trial is, of course, Barker v. Wingo (407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 [1972]), in which this Honorable Court created the four part balancing test. The delay in Barker was well over five years, Barker was in court throughout this period, and the rule announced in Barker was based on that fact. The four factors are firmly grounded on the availability of the accused for trial. Barker calls on the courts to balance the length of the delay, against the reasons for the

delay, against the accused person's assertion of his right, against prejudice. Now in the case of post-indictment, pre-arrest delay, the reason is always the same and is always insurmountable - the lack of personal jurisdiction over the accused. The accused can hardly be expected to assert his right if he either knows nothing of the charge or does and is avoiding arrest. The prejudice factors which relate to speedy trial are, as discussed in the previous paragraph, irrelevant to delay during which the accused was unaffected by the indictment. Thus, the Barker balancing test, excellent as it is in cases where the accused is available for trial, is irrelevant to the situation where the accused can not be located.

To say that speedy trial considerations do not apply to post-indictment,

pre-arrest delay is not to say that an accused who suffers actual prejudice is without a remedy. This Honorable Court has often recognized that due process rules protect against actual prejudicial effects of delays other than denial of speedy trial. United States v. Marion, 404 U.S. 307, 324 ff, 30 L. Ed. 2d 468, 480 ff, 92 S. Ct. 455 (1971); United States v. Lavasco, 431 U.S. 783, 789, 52 L. Ed. 2d 752, 758, 97 S. Ct. 2044 (1977)

The situation of an accused who has been indicted but not located and arrested is radically different from that of a party who has been arrested, whether before or after indictment, and is awaiting trial. However, the unarrested indictee's situation is nearly identical to that of the person who has been

neither arrested nor charged. At most the unarrested indictee's situation is like that of the party whose charges have been dropped. This Court addressed that situation in United States v. MacDonald, 456 U.S. 1, 8-9, 71 L. Ed. 2d 696, 704, 102 S. Ct. 1497 (1982).

For these reasons, post-indictment, pre-arrest delay occasioned by the inability to locate the indictee ought to be judged by due process standards or, if judged by speedy trial standards, there ought to be formulated standards appropriate to this situation.

III.

FORM OVER SUBSTANCE; THE DISCOURAGEMENT OF ORDERLY EXPEDITION.

In the final analysis, what is at issue here is a question of form over substance.

If the indictment in this case had not been returned until after Respondent Taylor's arrest, he would have had no speedy trial claim at all. United States v. Marion, 404 U.S. 307, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971); United States v. Lavasco, 431 U.S. 783, 52 L. Ed. 2d 752, 97 S. Ct. 2044 (1977); State v. Lockman, 169 Con. 116, 362 A. 2d 920 (1975); cert. den. 423 U.S. 991, 46 L. Ed. 2d 309, 96 S. Ct. 403; Preston v. State, 338 A. 2d 562 (S. Ct. Del., 1975) Respondent Taylor would have had no complaint that his arrest was delayed. Hoffa v. United States, 385 U.S. 293, 17 L. Ed. 2d 374, 87 S. Ct. 408 (1966) Certainly no one would have have presumed prejudice from a five month delay from arrest to trial. If during the period of this delay the officers had been seeking

the Respondent on a simple warrant based on an affidavit rather than a capias (warrant) based on an indictment, the Alabama Courts would have applied due process standards rather than speedy trial standards to this case. Under the due process standards Respondent Taylor would have had to show at a minimum that his defense was actually prejudiced by the delay - something he cannot do. The results would have been the same if, on realizing that Taylor could not be quickly located in September of 1976, the State had dismissed the indictment and then obtained a warrant. United States v. MacDonald, 456 U.S. 1, 71 L. Ed. 2d 696, 102 S. Ct. 1497 (1982) The nature of the legal paper which the officers sought to serve on Respondent Taylor was of controlling importance in this case, but why? What conceivable difference

could it make to Respondent Taylor, before, during or after his arrest that he was being sought on a capias rather than a simple warrant? Warrants and indictments are equally effective in commencing prosecutions for the purposes of the statute of limitations. See Title 15, Section 15-3-7, Code of Alabama, 1975; Appendix "C". Yet, because the officers were unable to serve a capias rather than a simple warrant, Mr. Taylor is automatically acquitted. This aggrandizement of form over substance is unreasonable and, as will be discussed below, defeats the policy of orderly expedition[13] of cases in general and

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13"...[T]he essential ingredient is orderly expedition and not mere speed...." Smith v. United States, 360 U.S. 1, 10, 3 L. Ed. 2d 1041, 1048, 79 S. Ct. 991 (1959) Quoted with approval in United States v. Marion, 404 U.S. 307, 313, 30 L. Ed. 2d 468, 474, 92 S. Ct. 455 (1971)

criminal cases in particular of which speedy trial is an intregal part.

Given that a simple warrant will not trigger the right to a speedy trial until it is executed and assuming, as most of the lower courts do, that an indictment does trigger speedy trial immediately, then the simple solution to the problem of the unlocatable indictee would be to dismiss the indictment and obtain a simple warrant. An even better policy would be to take no case before a grand jury unless the accused is in custody or under bail bond. A warrant would have, from the government's point of view, all of the advantages of an indictment without setting the running of the "speedy trial clock." A simple warrant would toll the Statute of Limitations and authorize the arrest and custody of the

accused, it would invoke the extraterritorial cooperation of other jurisdictions, it would be a suitable basis for a federal fugitive warrant and extradition. Once the accused was arrested on the simple warrant, the case could be presented to a grand jury. There are no disadvantages to the prosecution in this policy, but there are disadvantages to the judicial system and the accused.

Presenting a case to a grand jury takes time, often considerable time. If cases are presented to the grand jury only after accused persons are arrested, then trials must be delayed by as much time as it takes the grand jury to act. If there is a prolonged delay in locating the accused, then the accused person's trial would be further delayed by the grand jury proceedings. The government

does not need custody of an accused to indict him. The policy of "orderly expedition" would seem to encourage the prosecution to do what it can, when it can toward bringing cases to trial. Indictment is necessary for trial, and the prosecution ought to be encouraged to go to the grand jury as expiditiously as possible. Yet, the Alabama courts, like most of the lower courts, have adopted a policy which harshly taxes expeditious grand jury proceedings and thereby encourages delay.

It cannot, of course, be assumed that every case presented to a grand jury produces an indictment. This Honorable court has recognized that the grand jury proceeding provides valuable protection to innocent people. For

example, in Smith v. United States, (360 U.S. 1, 3 L.Ed. 2d 1041, 79 S.Ct. 991 [1959]), this Honorable Court wrote:

> "...The Fifth Amendment made the rule mandatory in federal prosecutions in recognition of the fact that the intervention of a grand jury was a substantial safeguard against oppressive and arbitrary proceedings...." (360 U.S. 1, 9, 3 L. Ed. 2d 1041, 1048)

Perhaps of more practical significance is the fact that grand jury proceedings, being more solemn and formal than the procedures which attend the issuance of simple warrants, are less prone to clerical and similar errors than warrant procedures. The first time Respondent Taylor's case was presented to the Jefferson County Grand Jury the case was "no billed" because of clerical errors and the charges were dropped. By discouraging the expeditious presentation

of cases involving unlocatable accused persons to grand juries, the policy now followed in Alabama and most states and federal circuits deprives these accused persons of valuable protection. This is the direct result of applying speedy trial standards to post-indictment, pre-arrest delay. The Petitioner respectfully submits that the better policy would be to encourage the early presentation of these cases to grand juries. Under such a policy, many of these accused persons would never become indictees and would cease being accused.

CONCLUSION

In conclusion, the Petitioner, the State of Alabama, respectfully submits that the decisions, opinions and orders of the Honorable Court of Criminal Appeals and Supreme Court of Alabama in this case erroneously resolved an important question of U.S. Constitutional Law which this Honorable Court has not heretofore had the opportunity to address. For this reason the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decisions and opinion of the Honorable Courts of Alabama and on such review will reverse the decisions of said Courts holding that Respondent Taylor was deprived of his right to a speedy trial

by reason of the delay in locating him after indictment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this _____ day of June, 1983, I did serve the requisite number of copies of the foregoing on the Attorney for Henry Taylor, Respondent, by mailing same to him, first class postage prepaid and addressed as follows:

Hon. G. Thomas Sullivan
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